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September 3, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA COURIER

Lawrence E. Strickling  
Chief, Common Carrier Bureau  
Federal Communication Commission  
445 12th Street SW  
Washington, DC 20554

**Re: Implementation of the Local Competition Provisions of the  
Telecommunications Act of 1996, CC Docket No. 96-98, UNE Remand  
Proceeding – *Ex Parte* Presentation of Covad Communications Company**

Dear Mr. Strickling:

BellSouth and SBC are seeking to use the Supreme Court's partial remand of the *Local Competition Order* as one more opportunity to press the Commission to restrict competition. In their recent *ex parte* filings, the two Bell Companies ask the Commission to allow incumbent local exchange carriers ("LECs") to prohibit requesting telecommunications carriers from using Unbundled Network Elements ("UNEs") to provide stand-alone interstate exchange access services.<sup>1</sup> Contrary to SBC's suggestion, wholesale adoption of this proposal would have a direct and adverse impact on CLECs that use UNEs to provide broadband services based on Digital Subscriber Line ("DSL") technologies.

For the reasons set forth below:

- Covad urges the Commission to reject the two BOCs' ill-conceived proposal. Neither the Communications Act, nor the Commission's existing Rules, nor the Commission's prior decisions provides any basis to allow an incumbent LEC to refuse to provide UNEs to a requesting carrier that seeks to provide an

<sup>1</sup> See Letter from William Barfield, Associate General Counsel, BellSouth Corporation to Lawrence E. Strickling (Aug. 9, 1999) ("*BellSouth Letter*") and Letter from Martin E. Grambow, Vice President and General Counsel, SBC Telecommunications, Inc. to Lawrence E. Strickling (Aug. 11, 1999) ("*SBC Letter*").

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interstate access service. To the contrary, the statute and the Commission's Rules and orders make clear that requesting carriers have an unqualified right to obtain UNEs to provide *any* telecommunications service.

- While Covad opposes any UNE use restrictions, if the Commission decides to allow incumbent LECs to restrict the ability of carriers that provide stand-alone exchange access services to obtain UNEs, any authorization should be subject to significant limitations. In particular, incumbent LECs should only be allowed to restrict the use of UNEs by carriers that provide services that are a direct substitute for those interstate access services that generate implicit subsidies for universal service. The Commission should not allow incumbent LECs to restrict the ability of CLECs to obtain UNEs to provide DSL services. DSL is a special access service used primarily by Internet Service Providers ("ISPs") and other business customers. These customers otherwise would purchase State-tariffed business lines, residential dial-up service, or interstate special access services, which do not generate implicit universal service subsidies. Therefore, there is no basis for the Commission to restrict the ability of CLECs to use UNEs to provide DSL access services to customers that would otherwise use these services.
- If, rather than adopted a limited authorization, the Commission grants incumbent LECs an unqualified right to refuse to provide UNEs to any carrier that seeks to offer a stand-alone exchange access service, the agency will need to take strong and swift action to ensure the survival of competition and continued investment in the competitive DSL market. Specifically, before granting such an authorization, the Commission will need to adopt a *federal* regime that allows competitive providers of interstate special access, such as Covad, to obtain conditioned, unbundled loops, cageless collocation, and line sharing at tariffed, cost-based rates.

#### **The SBC-BellSouth Proposal Raises Significant Concerns for CLECs that Seek to Offer DSL Service**

In their letters, SBC and BellSouth focus on so-called "extended link" or "extended loop" service. These terms refer to a combination of two UNEs: the local loop and local transport elements. SBC correctly observes that because of the technical properties of DSL, which is most effective over relatively short distances, CLECs are unlikely to request extended link service as commonly proposed to provide DSL service. Rather, a CLEC, such as Covad, that seeks to provide DSL typically obtains the local loop as a UNE and collocates a Digital Subscriber Line Access Multiplexer ("DSLAM") in each of the incumbent LEC's central office. From that point,

the CLEC typically routes subscriber traffic onto its local packet network, which delivers the traffic to the subscriber's ISP or other designated location.<sup>2</sup>

Regardless of whether CLECs seek to use extended loop service to provide DSL, wholesale adoption of the SBC-BellSouth approach would have a significant adverse effect on the ability of CLECs to provide DSL service. The Commission has held that DSL is an interstate special access service, which it has permitted carriers to tariff at the federal level.<sup>3</sup> If the Commission were to allow incumbent LECs to refuse to provide UNEs to CLECs that seek to provide stand-alone access services, the incumbent LECs could refuse to provide CLECs that seek to offer DSL services with conditioned loops at TELRIC prices. This would severely impair the ability of CLECs to offer DSL service.

### **The Commission Should Reject the SBC-BellSouth Proposal**

The SBC-BellSouth proposal is both unlawful and unprecedented. The Commission has long prohibited most carrier-imposed restrictions on the use of telecommunications facilities or services.<sup>4</sup> Consistent with this approach, Section 51.309(a) of the Commission's Rules expressly bars an incumbent LEC from imposing "limitations, restrictions, or requirements on the . . . use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."<sup>5</sup> Similarly, Section 51.703(c) of the Commission's Rules requires an ILEC to provide a CLEC with access to any UNE "in a manner that allows the requesting

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<sup>2</sup> In certain cases, a customer may be served by a remote terminal or digital loop carrier device. In those instances, to provide DSL service, a CLEC requires the ability to collocate DSL equipment at those remote terminals, obtain access to an ILEC-installed multi-hosting DSLAM at that terminal, and purchase "transport" from the remote terminal to the serving wire center. The Public Utility Commission of Pennsylvania recently ordered Bell Atlantic to provide CLECs with such access to remote terminals. *See* Joint Motion of Chairman Quain and Commissioners Rolka, Brownwell and Wilson, Joint Petition of Sens. Fumo, Madigan, and White, the Pennsylvania Cable & Telecommunications Association, and Seven CLECs for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, P-00991648, Aug. 26, 1999. The Commission should consider adopting the same approach in this proceeding.

<sup>3</sup> *See* GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, 22480 (1998) ("GTE's ADSL service is a special access service . . ."); *see also* Bell Atlantic Telephone Cos., Bell Atlantic Tariff No. 1, Bell Atlantic Transmittal No. 1076, 13 FCC Rcd 23667 (1998) (extending the GTE DSL decision to other ILECs' DSL services).

<sup>4</sup> *See, e.g.,* Resale and Sharing Order, 60 F.C.C.2d 261 (1976).

<sup>5</sup> 47 C.F.R. § 51.309(a).

telecommunications carrier to provide *any telecommunications service* that can be offered by means of that element.”<sup>6</sup> The SBC-BellSouth proposal plainly would violate these Rules.

The two statutory provisions on which SBC relies – Sections 251(c)(3) and 251(g) – do not authorize incumbent LECs to impose use restrictions on UNEs. To the contrary, Section 251(c)(3) unambiguously imposes an express duty on incumbent LECs to provide access to UNEs to “any requesting telecommunications carrier for the provision of a telecommunications service.”<sup>7</sup> Much as SBC may wish it were otherwise, it cannot transform its further statutory *obligation* to provide that access on “just, reasonable, and nondiscriminatory” terms into a justification for refusing to provide UNEs to carriers that seek to provide interstate access – which, indisputably, is a telecommunications service. Similarly, Section 251(g) clearly preserves the incumbent LECs’ *obligation* to provide access services on non-discriminatory terms. Nothing in this provision provides the basis for an incumbent LEC to deprive carriers that seek to offer a stand-alone interstate access service of their express statutory rights to obtain UNEs in order to preserve the subsidy-laden, carrier access charge regime.<sup>8</sup>

BellSouth’s suggestion that the Commission’s previous decisions in the *Local Competition* docket provide precedent for allowing carrier-imposed restrictions on the use of UNEs is nothing more than self-serving revisionism. Contrary to BellSouth’s suggestion, the Commission has *never* required carriers that obtain local loops or switching UNEs to provide *both* local exchange and exchange access services. Rather, prior Commission decisions have simply noted that – as a practical matter – most carriers are likely to respond to customer demand by providing both services.<sup>9</sup> As a matter of law, however, nothing in the Commission’s prior

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<sup>6</sup> *Id.* at § 51.703(c) (emphasis added)

<sup>7</sup> 47 U.S.C. § 251(c)(3).

<sup>8</sup> The fact that the Commission has adopted certain “transitional” measures, which have preserved the access regime pending the transition to a system of fully explicit universal service subsidies, is not relevant. In no prior instance has the Commission sought to preserve the access regime by depriving CLECs of their express statutory rights.

<sup>9</sup> See *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15679 (1996) (“Section 251(c) permits interexchange carriers and all other requesting telecommunications carriers to purchase unbundled elements for the purpose of offering exchange access services.” Carriers that obtain local loops as UNEs “*as a practical matter* will have to provide whatever services are requested by the customers to whom those loops are dedicated. . . . [I]nterexchange carriers purchasing local loops will *most often* not be able to provide solely interexchange service over those loops.” (emphasis added)); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 13042, 13048 (1996) (“A *practical consequence* . . . is that [a] carrier that purchases the local switching element is *likely* to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.” (emphasis added)); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed

orders prevents a carrier from using UNEs to provide service to customers who want only to obtain access services from that carrier. Indeed, this is precisely what Covad has done since its founding in October 1996.

**Any Restriction on the Use of UNEs to Provide Access Service  
Should Be Carefully Limited  
and Should Not Apply to CLECs That Provide DSL Services**

If, notwithstanding the above, the Commission determines that it can and should allow incumbent LECs to restrict the ability of requesting carriers to purchase UNEs, it should impose three important limitations.

*"Substitute" Services Only.* Both SBC and BellSouth premise their request solely on the perceived need to prevent bypass of their existing access service in order to prevent the loss of revenues used (at least in part) to generate implicit universal service subsidies.<sup>10</sup> Consequently, at the most, incumbent LECs should be permitted to limit the ability of requesting carriers to use UNEs if the carrier seeks to offer a stand-alone access service that is a *direct substitute* for those ILEC-provided services that generate implicit universal service subsidies.

Under this approach, CLECs could continue to obtain UNEs to provide interstate DSL services. Purchasers of DSL services typically use the service for access to the Internet and multi-state computer networks. In the absence of DSL service, these customers would be likely to obtain service using State-tariffed business or residential dial-up lines or, in some cases, federally tariffed special access services. None of these services contain implicit subsidies designed to advance universal service.<sup>11</sup> In fact, one of these services – residential dial-up lines – is the recipient of implicit universal service support. Migrating an end-user from an incumbent

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Rulemaking, 12 FCC Rcd 12460, 12495-96 (1997) ("In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer.").

<sup>10</sup> See *BellSouth Letter* at 1 (The Commission should impose "conditions on the use of UNEs in order protect the interstate access regime."); *SBC Letter* at 2 ("[T]he use of UNEs to avoid access charges threatened to undermine universal service and special access competition.").

<sup>11</sup> Special access services do not contain implicit universal service subsidies. If they did, the Commission could not have given incumbent LECs significant pricing flexibility for these offerings. See *Access Charge Reform*, Fifth Report and Order, CC Docket 96-262, FCC 99-206 (rel. Aug. 27, 1999). In any case, many special access services are provided pursuant to long-term contracts. As a result, even if it were possible to transfer special access circuits to extended link UNEs rapidly (an unlikely proposition, given the incumbent LECs' poor performance in providing UNEs), the presence of these long-term arrangements ensures that incumbent LECs would not face a dramatic and immediate reduction in special access revenues as a result of the availability of an Extended Link UNE.

LEC's residential dial-up line devoted exclusively to Internet access to a DSL line provided by a CLEC may actually *reduce* the ILEC's universal service obligations. Because the deployment of DSL service does not "deprive" incumbent LECs of revenues intended to provide an implicit subsidy for universal service, there is no basis to allow the incumbent LECs to withhold UNEs from CLECs that seek to provide this service.

*Limited Duration.* Even in the case of UNEs that are direct substitutes for an access service that generates implicit universal service subsidies, any authorization to impose UNE use restrictions should be for a limited duration. Covad proposes that, at the most, the Commission allow incumbent LECs to impose UNE use restrictions only until the earlier of twenty-four months from the grant of the authorization or the implementation of the high-cost support regime for Tier I LECs.

*Prior Commission Approval.* The Commission should require an incumbent LEC that seeks to impose a UNE use restriction to petition the Commission *before* doing so. In each case, the incumbent LEC should be required to make an affirmative case in support of its waiver. The incumbent LEC would be required to obtain a waiver for each category of UNE use restrictions (*i.e.*, local loop, switching, extended link, *etc.*) in each State. The ILEC would have the burden of proving that the particular use of the UNE is a direct substitute for an access service that generates implicit universal service subsidy. It should be incumbent upon the ILEC to provide a realistic estimate of the implicit universal service subsidy likely to be "lost" as a result of the deployment of a UNE-based access service.

Even with these limitations, Covad believes that the better course would be for the Commission to decline to adopt *any* regulatory regime that discriminates or differentiates among particular services provided over UNEs. Such a regime has the potential for delays and disputes, which would damage the development of a competitive market. Such a regime also would threaten consumers' privacy interests. Before providing UNEs, incumbent LECs would routinely require CLECs to provide information regarding the service that the CLEC would use the UNE to provide. In light of the incumbent LECs' recent, and thus far successful, efforts to over-turn the Commission's rules governing the use of customer proprietary network information, the Commission should be especially wary in granting any request that would increase the incumbents' ability to obtain customer-specific information.

**If the Commission Bars the Use of UNEs by CLECs that Seek to Provide DSL,  
Then It Must Establish a Comprehensive Federal DSL Regime**

Finally, if the Commission decides to allow incumbent LECs to refuse to provide UNEs to any carrier that seeks to provide a stand-alone exchange access service, the agency will need

to take strong action to preserve competition in the DSL market *before* it grants this authorization.

If the Commission were to allow incumbent LECs to prohibit requesting carriers from using conditioned loop UNEs to provide any stand-alone exchange access service, ILECs would have the unilateral right to deny data CLECs access to the local loop for DSL services. Because use of the existing loop plant is the only economically feasible means to provide DSL service, this would have a significant adverse impact on CLECs' ability to provide this service. Such a result plainly would be inconsistent with the pro-competitive goal of the Telecommunications Act and the specific directive in Section 706 to promote the competitive deployment of advanced telecommunications services.

In light of the above, before the Commission takes action that prevents carriers from obtaining local loop elements necessary to provide DSL service, it should establish a uniform federal regulatory regime that requires the incumbent LECs to provide DSL carriers with cageless collocation,<sup>12</sup> unbundled, conditioned loops, and DSL line sharing. These offerings should be made available at cost-based prices established in federal tariffs.

The adoption of such a regime is well within the Commission's jurisdiction. As noted above, the Commission has held that DSL is an interstate special access service. In the *Special Access Expanded Interconnection Order*, the Commission determined that it has "legal authority under Sections 1, 4(i), 201, 202, 205, and 214(d) of the Communications Act" to require an incumbent LEC to allow competitive carriers that want to provide interstate special access service to connect their local transport facilities to the incumbent LEC's local loop facilities, and collocate equipment at the incumbent's central office. The Commission also found that these provisions authorize it to adopt a "rate structure and pricing measures" governing the incumbent LEC's provision of interconnection services.<sup>13</sup> These provisions, along with Section 251, vest the Commission with authority to require incumbent LECs to provide CLECs that want to offer interstate DSL service with cageless collocation, unbundled conditioned loops, and line sharing at cost-based rates.

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<sup>12</sup> Covad and several other parties in CC Docket No. 98-147 have described the incumbent LECs failure to comply with the Commission's March 31, 1999 cageless collocation order.

<sup>13</sup> *Expanded Interconnection With Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7372-73 & 7472-75 (1992).

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As a result of the Commission's pro-competitive policies, "data CLECs" – such as Covad – are using UNEs to aggressively build nationwide networks that will support DSL services. Covad is currently providing competitive DSL services in twenty-two metropolitan areas nationwide, and will reach one-quarter of the nation's homes and businesses by the end of 1999. The investment community has funded this network construction by Covad and other data CLECs because of confidence in the availability of collocation and unbundled DSL-conditioned loops nationwide.

The current *UNE Remand Proceeding* provides the Commission with an opportunity to build on the pro-competitive foundation that the agency laid in the earlier phases of the *Local Competition* proceeding. The Commission should decline SBC and BellSouth's invitation to use this proceeding to roll back the gains that competitive providers (and the growing number of customers they serve) have made. If the Commission chooses to allow the incumbent LECs to impose restrictions on the use of UNEs, however, it should do so in a manner that allows for the continued growth of the competitive DSL market.

Please feel free to contact Covad's Associate General Counsel, Mr. Thomas Koutsky, or the undersigned if you have any questions.

Sincerely,



Jonathan Jacob Nadler  
Counsel for  
Covad Communications Company

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